

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Petition of Lafayette City-Parish Consolidated)	CSR-8152-Z
Government of Lafayette, Louisiana, d/b/a)	
Lafayette Utilities System, for Waiver of)	
Section 76.1204(a) of the Commission's Rules)	CS Docket No. 97-80
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation)	
Devices)	

FILED/ACCEPTED

MAY 14 2009

Federal Communications Commission
Office of the Secretary

To: The Secretary
Attn: Chief, Media Bureau

COMMENTS OF COX COMMUNICATIONS LOUISIANA, LLC D/B/A COX
COMMUNICATIONS GREATER LOUISIANA

COX COMMUNICATIONS LOUISIANA, LLC
D/B/A COX COMMUNICATIONS GREATER
LOUISIANA

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**COMMENTS OF COX COMMUNICATIONS LOUISIANA, LLC D/B/A COX
COMMUNICATIONS GREATER LOUISIANA**

Cox Communications Louisiana, LLC d/b/a Cox Communications Greater Louisiana ("Cox"), by its attorneys and pursuant to Section 76.7 of the rules of the Federal Communications Commission (the "Commission"), 47 C.F.R. § 76.7, hereby submits these Comments regarding the Petition for Waiver filed by Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System ("LUS") in the above-captioned matter. LUS requests a waiver of Section 76.1204(a) of the Commission's rules, 47 C.F.R. § 76.1204(a), that is unlimited in scope and duration, and without reference to any specific equipment, for a municipally-owned cable television system that offers eighty-eight analog and three hundred digital video channels to residents of Cox's franchise area in the City of Lafayette.¹

¹ As the Commission is aware, Cox does not agree that the prohibition set forth in Section 76.1204(a) is justified as a policy matter due to, among other things, the unnecessary costs it imposes on cable subscribers. Cox's Comments in this proceeding are limited to whether the waiver LUS has requested satisfies the governing standards reflected in the Communications Act and the Commission's precedents. Regardless of the Commission's determination of that issue, however, Cox believes that regulatory parity should be the overriding principle here. Therefore, if one competitor in the market, LUS, is granted a waiver of Section 76.1204(a), fair competition demands that other similarly situated competitors, such as Cox, be granted the same waiver.

I. BACKGROUND

Section 76.1204(a) of the Commission's rules requires that:

[a] multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices. Commencing on July 1, 2007, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.²

This prohibition is known as the "integration ban" and is imposed on Multichannel Video Programming Distributors ("MVPDs"), other than Direct Broadcast Satellite operators, to support a retail market for customer premises equipment.³ LUS seeks a waiver of the integration ban in connection with video services it has offered since January 2009 pursuant to the statutory waiver provision contained in Section 629(c) of the Communications Act of 1934, as amended (the "Act"),⁴ as well as pursuant to the Commission's more general waiver authority under Sections 1.3 and 76.7 of its rules.⁵ LUS, however, has not justified its request under any of the Commission's applicable waiver standards.

II. DISCUSSION

A. Waiver Standards.

The Commission may waive its rules, in whole or in part, for good cause shown.⁶ A waiver, however, is only appropriate "if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule."⁷ Moreover, "[s]ound administrative procedure contemplates waivers, or exceptions granted only pursuant to a relevant standard . . . best expressed in a rule that obviates discriminatory approaches."⁸ Courts have recognized that when an administrative body acts in reliance on an established and tested agency rule, presumptions of regularity apply with special

² 47 C.F.R. § 76.1204(a).

³ See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, *Report and Order*, 13 FCC Rcd 14775 (1998).

⁴ 47 U.S.C. § 549(c).

⁵ 47 C.F.R. §§ 1.3, 76.7.

⁶ 47 C.F.R. § 1.3.

⁷ *Comsat Corporation*, 12 FCC Rcd 12059 (1997) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

force. Therefore, “[a]n applicant for a waiver faces a high hurdle even at the starting gate. . . . [and] must plead with particularity the facts and circumstances which warrant” the waiver.⁹

Congress and the Commission also have established specific standards for waivers of the integration ban. In particular, waivers under Section 629(c) of the Act are restricted to “a limited time,” upon a demonstration that “such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.”¹⁰ Under the Commission’s more general waiver rules, integration ban waivers are restricted to “low cost, limited capability” devices and those systems that commit to migrating all their services to a digital platform.¹¹ In this case, LUS has neither demonstrated any special circumstances justifying an alternative standard that would better serve the public interest nor sought a waiver under the existing standard that is limited in time, restricted to low-cost and limited-capability devices, necessary for the introduction of new services or products, or otherwise justified by a commitment to providing only digital services.

B. A Waiver Is Not Necessary For The Introduction Of New Programming or Services.

LUS bases its waiver request, in part, on Section 629(c) of the Act. As observed above, Section 629 directs the Commission to waive the integration ban “for a limited time” if an MVPD demonstrates that it “is necessary to assist the development or introduction of a new or improved” programming or services.¹² The LUS waiver request, however, is neither limited in time nor necessary for the introduction of new LUS programming or services.

The Commission’s established interpretation of the statutory waiver provision, and the statute itself, preclude the grant of a waiver to LUS in this case. As the Bureau reasoned in *Armstrong Utilities, Inc.*, “[w]hile it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a

⁹ *Id.* at 1157 (internal quotations omitted, quoting *Rio Grande Fellowship, Inc. v. FCC*, 406 F.2d 664 (1968)).

¹⁰ 47 U.S.C. § 549(c).

¹¹ *See, e.g., Bend Cable Communications d/b/a BendBroadband*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”).

¹² 47 U.S.C. § 549(c).

lenient manner. Indeed, as we stated in the *BendBroadband Order*, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).”¹³ Moreover, where, as here, digital services are already provided, the Commission determined that “the waiver could hardly be ‘necessary’ for the ‘development or introduction’ of these services, as they already exist.”¹⁴

LUS explains that it launched its “\$110 million fiber-to-the-home system,” in January 2009 and provides subscribers “three main options” for video services, two of which are analog basic and expanded basic service, and one of which is digital video service.¹⁵ In other words, LUS already offers its digital video service to subscribers without a waiver of the integration ban. In the final analysis, the requested waiver fails to satisfy the Commission’s existing Section 629(c) standards: it is unlimited in time and the Commission has determined such waivers to be inappropriate for existing services that LUS already is providing.

C. The Bureau’s IPTV Waiver Was Limited To Advanced-Capability Devices And Expired On July 1, 2008.

LUS claims it should be entitled to a waiver because part of its system provides IPTV services and because it “simply requests a waiver similar to those which the Commission has already granted to numerous other similarly-situated IPTV systems operators.”¹⁶ LUS fails to acknowledge, however, that the Commission’s waivers were limited to systems that committed to providing an all-digital network and to “HD and DVR devices with integrated security elements for use with Internet Protocol (“IP”), Asynchronous Transfer Mode (“ATM”), or hybrid QAM/IP systems.”¹⁷ The Commission’s one-year IPTV waiver for integrated HD and DVR devices expired on July 1, 2008 and was granted with the condition that “[o]ver the next year, those operators should work to develop and deploy a separable security solution that will allow

¹³ *Armstrong Utilities, Inc.*, 22 FCC Rcd 11725, 11741 at para. 46 (Med. Bur. 2007), citing *BendBroadband Order*, 22 FCC Rcd at 214, para. 14.

¹⁴ *Armstrong Utilities, Inc.*, 22 FCC Rcd at 11740, para 45.

¹⁵ LUS Petition at 2-3.

¹⁶ LUS Petition at 5.

¹⁷ See Consolidated Requests For Waiver Of Section 76.1204(a) of the Commission’s Rules, *Memorandum Opinion and Order*, 22 FCC Rcd 11780, 11804 at para. 61 (footnote omitted) (Med Bur. 2007) (“*All-Digital Order*”); Consolidated Requests For Waiver Of Section 76.1204(a) of the Commission’s Rules, *Memorandum Opinion and Order*, 23 FCC Rcd 4465 at n. 4 (Med. Bur. 2008) (“*2008 Consolidated Waiver Order*”).

for interoperability between their systems and consumer electronics equipment, preferably a downloadable solution based on open standards.”¹⁸

In this case, LUS has not committed to providing an all-digital network and its waiver request is inconsistent with the Commission’s now-expired IPTV waiver because it is not limited to specific HD and DVR devices or to a limited period. Instead, LUS apparently requests a waiver for any device for an unlimited time. Moreover, even the now expired one-year waiver for HD and DVR devices previously granted to IPTV operators should not be extended to LUS here because the IPTV industry has already had almost two years to come into compliance with the Commission’s rules. Since the Commission’s advanced-capability IPTV waivers expired on July 1, 2008, other operators subject to the IPTV waiver, such as Verizon, brought their systems into compliance with the integration ban.¹⁹ To Cox’s knowledge, no other IPTV operator now operates under a waiver of the integration ban. LUS should be treated no differently.

D. Integration Ban Waivers Under The Commission’s General Waiver Provisions Have Been Limited To Low-Cost, Limited-Capability Devices And All-Digital Systems.

The LUS waiver request also is inconsistent with the standards the Commission established under its general waiver authority reflected in Sections 1.3 and 76.7 of the Commission’s rules because the request is not limited to low-cost, limited capability devices and because LUS has not committed to operating an all-digital system. Indeed, its non-compliance with the Commission’s rules is the result of its own business decisions.

In the *2005 Deferral Order*, the Commission held that it would consider integration ban waivers for low-cost, limited capability boxes because “it is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition.”²⁰ The Bureau has since cautioned repeatedly that “the low-cost, limited-capability waiver standard that the Commission created in the *2005 Deferral Order* is, first and foremost, a narrow one.”²¹ The

¹⁸ *All Digital Order*, 22 FCC Rcd at 11804, para. 61 (footnote omitted).

¹⁹ See Todd Spangler, *Verizon Bites CableCard Bullet; Telco Required To Deploy HD And DVR Boxes With Separable Security By July 1*, MULTICHANNEL NEWS (May 15, 2008).

²⁰ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6813 at para. 37 (2005) (“*2005 Deferral Order*”).

²¹ See, e.g., *Armstrong Utilities, Inc.*, 22 FCC Rcd at 11741, para. 48.

LUS waiver request, however, is not limited to low-cost, limited capability equipment. In fact, the LUS waiver request is not limited to any specific equipment.

Even where the waiver standard established in the *2005 Deferral Order* is not satisfied, the Commission has granted waivers under its general waiver authority for systems that commit to providing all-digital networks. In the *BendBroadband Order*, the Bureau stated that it could not grant the requested waiver under the *2005 Deferral Order* standard because the device for which the operator requested the waiver was capable of accessing advanced services such as video-on-demand and consequently did not qualify as a ‘low-cost, limited-capability’ device.²² The Bureau nevertheless found that a waiver could lead to concrete, non-speculative benefits because the operator’s commitment of “migration to an all-digital network prior to the end of analog, over-the-air broadcasts would enable it to ensure that its cable subscribers will be able to view digital broadcast signals after the end of the DTV transition.”²³ Given that commitment, the Bureau recognized that “a conditioned grant of the Waiver Request would facilitate BendBroadband’s rapid transition to an all-digital network (*i.e.*, by 2008), which was a critical factor in the Commission’s decision to consider waiver requests at all.”²⁴ The Bureau therefore granted the requested limited-duration waiver based on the conditions that the operator:

(1) notifies all of its analog customers of its plans to go all digital at least six months in advance of that event and submits a sworn declaration to the Commission confirming that such notice has been provided, and (2) ensures that, at least six months prior to its migration to all digital, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view BendBroadband’s video programming on their television sets and submits a sworn declaration to the Commission confirming that this is the case, and (3) publicly commits to this plan by sworn declaration.²⁵

In the *All-Digital Order* and in subsequent orders, the Bureau has granted similar conditional waivers of the integration ban to MVPDs that committed to transitioning to an all-digital network and to notifying all their analog customers of their plans to do so.²⁶

In this case, LUS admittedly operates a hybrid analog and digital system and has not committed to transitioning its system to operate as an all-digital system. Instead, LUS expresses

²² *BendBroadband Order*, 22 FCC Rcd at 217, para. 24.

²³ *Id.*

²⁴ *Id.*

²⁵ *BendBroadband Order*, 22 FCC Rcd at 218, para. 26.

²⁶ See, e.g., *All-Digital Order*, 22 FCC Rcd 11780; *2008 Consolidated Waiver Order*, 23 FCC Rcd 4465.

some confusion over the meaning of the term “all-digital.” LUS claims that any subscriber can receive “all-digital” service, but “[i]f the Commission intended ‘all-digital’ service to mean ‘only’ digital service, then this would create a problem for LUS”²⁷ as it apparently has no plans to discontinue its analog service. The Commission’s standard is unambiguous, however: “all-digital” service in fact means “only” digital service. When BendBroadband requested its waiver, it already had become “one of the first cable operators in the nation to complete a network-wide transition to digital simulcast, allowing it to provide 100% all-digital services to all of its digital cable subscribers,”²⁸ but the Bureau noted that “the transition to an all-digital network,” in contrast to the mere offering of all-digital services, “requires every analog device in a cable subscriber’s home to have a set-top box or CableCARD.”²⁹ Therefore, LUS does not operate an “all-digital” network under the Commission’s definition, and unless it commits to doing so its waiver request is inconsistent with the Commission’s standards.

Indeed, the Bureau has specifically denied waiver requests when, as here, MVPDs asserted that “grant of the Waiver Requests would further the digital transition and the deployment of digital services” but had not committed to operating an all-digital network in furtherance of the DTV transition.³⁰ The Bureau explained that it “[did] not believe that these waivers will significantly further these public interest benefits, as this assertion is too speculative” absent a commitment to providing an all-digital network.³¹

The Bureau, moreover, also has declined to grant waivers of Section 76.1204(a) based on a substantial investment in non-compliant technology. In *Massillion Cable TV, Inc.*, for example, an operator encountered delays transitioning to an all-digital system that it expected would lead to a significant number of integrated devices remaining in its inventory until after July 1, 2007.³² The operator sought a limited waiver of the integration ban to allow it to exhaust its inventory of new, integrated devices. The Bureau rejected the request, however, and explained that “Commission precedent is clear that regulated entities are responsible for the

²⁷ LUS Petition at 6.

²⁸ See *BendBroadband Order* at 213 para 13 (quoting BendBroadband Waiver Request, and rejecting BendBroadband request for waiver under Section 629(c)).

²⁹ *BendBroadband Order*, 22 FCC Rcd at 216, para. 23.

³⁰ *Armstrong Utilities, Inc.*, 22 FCC Rcd at 11744, para. 54.

³¹ *Id.*

³² *Massillion Cable TV, Inc.*, 22 FCC Rcd 11757 (Med. Bur. 2007).

consequences that flow from their business decisions,”³³ and that “[g]ranting a waiver of the integration ban based on a business decision to purchase thousands of integrated set-top boxes less than one year prior to the July 1, 2007 deadline will impede” the achievement of the goals of the integration ban.³⁴

Here, although LUS invested substantial sums to build a communications network capable of delivering multichannel video, telephone, and Internet services, it apparently made the business decision to build its system without considering Commission rules applicable to LUS and other similarly situated MVPDs.³⁵ As *Massillion Cable* demonstrates, however, that is not an independent justification for a waiver of the integration ban. Moreover, LUS failed to request a waiver before offering non-compliant devices to its customers. Instead, it asks the Bureau to retroactively excuse its non-compliance, which resulted from its decision to build an IPTV network without considering whether compliant navigation devices were available for it.

Cox competes with LUS for video, telephone, and Internet customers in Lafayette, and has been offering superior voice, video, and data services to Lafayette consumers for many years in compliance with the Commission’s rules. Cox welcomes LUS to the Lafayette video market and looks forward to competition, but believes that LUS and Cox, as marketplace competitors, should be on equal footing and subject to the same rules. Cox is not operating under a waiver of the integration ban, but instead has made every effort and borne every expense required to comply with the integration ban. As demonstrated above, the LUS request for waiver of the integration ban is inconsistent with the relevant statutory and regulatory standards that the Commission has established. LUS, therefore, should comply with the same Commission rules to which Cox and other MVPDs also are bound. To the extent the Commission concludes that a waiver for the integration ban is justified in this case, fair competition requires a level regulatory playing field in which Cox and other competitive MVPDs also are granted the same waiver.

³³ *Massillion Cable TV, Inc.*, 22 FCC Rcd at 11764, para. 14, (citing *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petitions for Waiver*, 22 FCC Rcd 8927, 8935 at para. 23 (2007) (“It is the Commission’s general policy not to grant extensions of compliance deadlines based on matters within the regulated entities’ control, such as business decisions”) (citing *MCI Communications Corporation*, 2 FCC Rcd 223, 234 at para. 7 (1987) and *P&R Temmer v. FCC*, 743 F.2d 918, 930 (D.C. Cir. 1984))).

³⁴ *Massillion Cable TV, Inc.*, 22 FCC Rcd at 11765, para. 14.

³⁵ LUS Petition at 2-3.

III. CONCLUSION

For the reasons set forth above, the Bureau should deny the Petition for Waiver.

Respectfully Submitted,

COX COMMUNICATIONS LOUISIANA,
LLC D/B/A COX COMMUNICATIONS
GREATER LOUISIANA

By:



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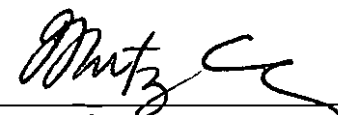
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May 14, 2009

Verification

To the best of my knowledge, information and belief formed after reasonable inquiry, these Comments are well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



Gary S. Lutzker

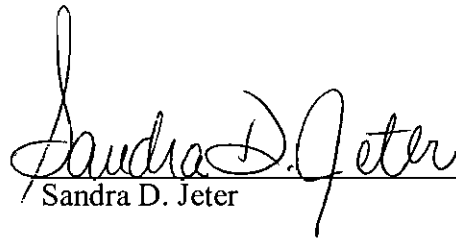
May 14, 2009

CERTIFICATE OF SERVICE

I, Sandra D. Jeter, a secretary at the law firm of Dow Lohnes PLLC, certify that on this fourteenth day of May, 2009 I caused the foregoing Comments to be served by first-class mail, except where hand delivery is indicated, on the following:

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